VON WOBESER

MEXICAN LEGAL NEWS

Deadline to file legacy claims under NAFTA's sunset period approaches. Investors must evaluate their options quickly

Time is of the essence for Canadian and US investors in Mexico. July 1st, 2023, marks the last day investors can file a request for arbitration under the investment chapter of the North America Free Trade Agreement ("**NAFTA**"). However, to bring a claim, investors must first file a notice of intent 90 days before the commencement of the arbitration, *i.e.*, on April 1st, 2023, at the latest.

Therefore, the first quarter of 2023 will be crucial for foreign investors as they will have to analyze their *statu quo* to determine whether to raise a legacy claim under NAFTA or risk forfeiting such right.

The United States, Mexico, and Canada Agreement ("**USMCA**") entered into force on July 1st, 2020, replacing NAFTA. Nonetheless, according to Annex 14-C of USMCA, investors still have access to NAFTA's investment dispute resolution system for "legacy investments" up to three years after NAFTA's termination date.[1] This provision is also known as the "sunset clause".

A "legacy investment" is any investment made between January 1st, 1994 (the date on which the NAFTA entered into force) and July 1st, 2020 (the date of its termination).[2] This three-year period will elapse on July 1st, 2023. From this date onwards, investors who made investments between 1994 and 2020 will no longer have access to the investment protection mechanism under NAFTA.

This date will mark a turning point for investors in the region. NAFTA's dispute resolution mechanism has been successful so far. To this day, there have been over 76 claims under Chapter 11 of NAFTA: 30 against Canada, 27 against Mexico, and 19 against the United States.[3]

Conversely, no investment arbitration has yet commenced under the USMCA, and there are at least three known legacy claims pending under NAFTA[4] with some notices of intent already filed. This is not a coincidence. Several factors lead to conclude that investment protection under NAFTA is more favorable than under USMCA.

First, Canada did not sign on to the investor-State dispute settlement mechanism under USMCA. Consequently, investment arbitration under USMCA will no longer be available for ***(i)*** Canadian investors with investments in Mexico or the United States and ***(ii)*** Mexican and American investors with investments in Canada.

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1 USMCA. Annex 14-C (3).
2 USMCA. Annex 14-C (6)(a).
3 *See*: The United Nations Conference on Trade and Development, Investment Policy Hub, Investment Dispute Settlement Navigator, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement
4 Finley and others v. Mexico, First Majestic v. Mexico, L1bero v. Mexico, and TC Energy and TransCanada v. USA (II).

Investment disputes between Canadian investors and Mexico and between Mexican investors in Canada may still be resolved under a separate treaty, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**"). However, the United States is not a party to this treaty, which means that Canadian investors in the United States and American investors in Canada will no longer have access to investment arbitration proceedings against the State where they invested.

Second, USMCA's substantive and procedural investment protection provisions have a more limited scope than NAFTA's. For instance, unlike Chapter 11 of NAFTA,[5] Chapter 14 of USMCA does not allow regular investors submitting to arbitration claims concerning indirect expropriation and violations of the minimum standard of treatment.

In addition, USMCA requires investors to bring proceedings before a competent court or administrative tribunal before initiating arbitration. Investors must prove that they have obtained a final ruling from a competent court or that they have been unable to obtain it after 30 months of litigation.[6] In contrast, NAFTA's investment dispute resolution mechanism does not contain this limitation.

Although investors with a "covered government contract" under USMCA may have broader protection than regular investors, this protection is still less favorable than NAFTA's. Covered government contracts only comprise specific sectors: oil and natural gas, power generation, telecommunications, transportation, and infrastructure.[7]

Further, investors with covered government contracts can raise claims concerning the violation of the minimum standard of treatment. However, the Treaty provides that "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectation does not constitute a breach of [the minimum standard of treatment] even if there is loss or damage of the covered investment as a result."[8]

NAFTA does not include this wording. However, on 31 July 2001, the Free Trade Commission issued a note of interpretation of some provisions of Chapter 11 of NAFTA, determining that "the concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[9]

Similarly, while covered investments under USMCA are protected against indirect expropriation, investors must prove that the State measure destroyed the economic value of the investment since the mere fact that an action by the host State "has an adverse effect on the economic value, standing alone, does not establish that an indirect expropriation has occurred."[10] NAFTA's provisions do not include this express limitation.

To conclude, the preclusion of the possibility to bring up legacy claims under NAFTA may adversely affect foreign investors within the region since USMCA is not equally favorable. Therefore, investors must act quickly if they intend to initiate an investment arbitration proceeding based on NAFTA's sunset clause.

Von Wobeser y Sierra's dispute resolution and public law practices bring extensive knowledge and years of experience in helping clients protect their investments in Mexico through domestic and international proceedings effectively. Also, our Mergers and Acquisitions practice is skillful in designing adequate corporate structures that protect new foreign investments in the country through international treaties.

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5 NAFTA. Article 1105 (1) and 1120 (1).
6 USMCA. Annex 14.D.5 (1).
7 USMCA. Annex 14- E.
8 USMCA Article 14.6 (4).
9 See: NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions*, July 31, 2001, available at http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp.
10 USMCA Annex 14-B (3) (a) (1).

We would be glad to resolve any doubts you may have concerning investment protection and the timely exercise of your rights, both under domestic and international law. If you need additional information, please contact:

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